

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KWESI WHYTE,) Case No. CV 12-8583 JST (JCG)

Petitioner,

V.

RONALD BARNES, Interim Warden,

Respondent.

Case No. CV 12-8583 JST (JCG)

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DENYING CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge’s Report and Recommendation, Petitioner’s Objections to the Report and Recommendation, and the remaining record, and has made a *de novo* determination.

Petitioner's Objections generally lack merit for the reasons set forth in the Report and Recommendation. There is one issue, however, that warrants brief amplification here.

Petitioner contends that he is entitled to equitable tolling because his appellate counsel never informed him that the California Supreme Court denied his petition for direct review on March 22, 2006. (Obj. at 5.) Petitioner also alleges that counsel withheld “client work-product file[s]” from him until March or April of 2007, when the State Bar of California ordered counsel to return the files to Petitioner. (*Id.*) Petitioner admits that he thereafter waited five years to inquire into the status of his

1 petition for direct review with the California Supreme Court. (*Id.* at 6-7.)

2 Initially, the Court notes that an attorney’s “negligence in general do[es] not
 3 constitute [an] extraordinary circumstance[] sufficient to warrant equitable tolling.”
 4 *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001). Instead, an attorney’s conduct
 5 must have been sufficiently “wrongful” or “egregious” in order to justify equitable
 6 tolling. *See Shannon v. Newland*, 410 F.3d 1083, 1090 (9th Cir. 2005).

7 Even assuming that counsel’s conduct was sufficiently egregious, Petitioner has
 8 failed to demonstrate that he exercised diligence in pursuing habeas relief, or that his
 9 failure to file a timely federal petition was attributable to his counsel’s conduct, and
 10 not his own. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (“a litigant seeking
 11 equitable tolling bears the burden of establishing two elements: (1) that he has been
 12 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
 13 his way.”); *see also Bryant v. Schriro*, 499 F.3d 1056, 1061 (9th Cir. 2007) (“The
 14 prisoner must show that the extraordinary circumstances were the *cause* of his
 15 untimeliness.”) (emphasis added) (citations omitted).

16 Here, although Petitioner learned of his counsel’s allegedly wrongful conduct by
 17 March 2007, he waited until September 30, 2012, *over five years*, to file his first
 18 habeas petition in this Court.¹ (Obj. at 5; R&R at 1, 4.) Petitioner did not file any
 19 other habeas petition in any other court during that time, nor did he inquire into the
 20 status of his case with the California Supreme Court until September 3, 2012. In light
 21 of these self-inflicted and unreasonable delays, the Court cannot find that Petitioner
 22 exercised the requisite diligence, or that “extraordinary circumstances beyond
 23 [Petitioner’s] control ma[de] it *impossible* to file [the] [P]etition on time.” *See Stillman*
 24 *v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003) (emphasis added) (citation omitted).

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26 Accordingly, IT IS ORDERED THAT:

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 28 ¹ AEDPA’s one-year limitation period expired on June 20, 2007. (R&R at 1, 4.)

1 1. The Report and Recommendation is approved and accepted;
2 2. Judgment be entered denying the Petition and dismissing this action with
3 prejudice; and
4 3. The Clerk serve copies of this Order on the parties.

5 Additionally, for the reasons stated in the Report and Recommendation, the
6 Court finds that Petitioner has not made a substantial showing of the denial of a
7 constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Miller-El v.*
8 *Cockrell*, 537 U.S. 322, 336 (2003). The Court thus declines to issue a certificate of
9 appealability.

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11 DATED: April 1, 2013



12
13 HON. JOSEPHINE STATON TUCKER
14 UNITED STATES DISTRICT JUDGE

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